IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL REVISION APPLICATION NO. 30 OF 2005

Shri Katu Dholo Gaonkar,
s/o Dholo Gaonkar,
aged 46 years,
r/o H.No.264, Nuvem,
Shirstal, Canacona-Goa. ... Applicants

versus

State(Through P.P.) ... Respondent

Mr. Arun Bras De Sa, Advocate for the Applicant.

Mr. S. N. Sardessai, Public Prosecutor for the State.

CORAM : N. A. BRITTO, J.

DATE : 6TH DECEMBER, 2005.

ORAL ORDER

The applicant in this revision application is an accused who has been convicted and sentenced by the learned Assistant Sessions Judge vide Judgment/Order dated 3-1-2005 and whose conviction and sentence has been upheld by the

learned Sessions Judge, Margao, vide Judgment/Order dated 10-11-2005.

2. The Canacona Police Station had filed a charge-sheet against the applicant(accused, for short) under Sections 307 and 452 of I.P.C. with the allegation that on 6-3-2003 at about 9.30 a.m. the accused had committed criminal trespass into the house of his brother Chandrakant Gaonkar and attempted to murder him.

3. The case against the accused was committed to the Court of Sessions by Order dated 23-8-2004 and the learned Sessions Judge by his Order dated 13-9-2004 apparently passed under Section 194 of the Code of Criminal Procedure, 1973 (Code, for short) made over the case to be tried by the IIIrd Assistant Sessions Judge, Margao.

4. The learned Assistant Sessions Judge by his said Judgment/Order dated 3-1-2005 has convicted and sentenced the accused under Section 452 of the Code to imprisonment for one year and fine of Rs.500/- and in default to undergo S.I. for

three months, and under Section 307 I.P.C., to undergo five years S.I. and fine of Rs.5000/- and in default to undergo six months S.I. A sum of Rs.5000/- from the fine, if recovered, is ordered to be paid to the brother of the accused i.e. PW5/Chandrakant Gaonkar.

5. The accused filed an appeal to the Court of Sessions, being Criminal Appeal No.2/2005 and the learned Sessions Judge was pleased to dismiss the same. By this revision, the accused seeks to set aside the said two Judgments/Orders of the learned Assistant Sessions Judge as confirmed by the learned Sessions Judge.

6. At the hearing of this revision, Mr. Arun Bras De Sa, the learned Counsel of the accused has submitted that Section 307 I.P.C. has been made punishable in two parts, one with imprisonment for a term which may extend to ten years, and the other when hurt is caused, with either imprisonment for life or to such punishment herein before mentioned. Mr. Bras De Sa has further submitted that since in the case at hand, admittedly, hurt was caused to the injured Chandrakant Gaonkar the offence

allegedly committed by the accused was punishable with imprisonment for life and, therefore, the case could not be tried by an Assistant Sessions Judge who can inflict punishment upto ten years in terms of Section 28(3) of the Code. As per him, an Assistant Sessions Judge is not an Additional Sessions Judge. Mr. Bras De Sa has, therefore, submitted that the conviction and sentence imposed on the accused is ab initio without jurisdiction, illegal, null and void. It has also been submitted that the impugned Judgment of the learned Assistant Sessions Judge is unsustainable in the eyes of law inasmuch as in case of punishment imposed against him under Section 307 I.P.C. by the learned Sessions Judge or an Additional Sessions Judge an appeal would lie to this Court which he has been deprived of and, therefore, serious prejudice has been caused to the accused. Mr. Bras De Sa has submitted that consent of the accused could not have given jurisdiction to the learned Assistant Sessions Judge to try his case and in support of this submission Mr. Bras De Sa has placed reliance on the case of **Harshad Chiman Lal Modi** v. **DLF Universal Ltd. and another**((2005) 7 SCC 791). Mr. Bras has also submitted that where law requires a thing to be done in a certain manner, it has to be done in that manner or

not at all and in support of this proposition Mr. Bras has placed reliance on the case of **Dhanajaya Reddy** v. **State of Karnataka** ((2001) 4 SCC 9).

7. On the other hand, Mr. S. N. Sardessai, the learned Public Prosecutor on behalf of the State, has submitted that the accused did not raise the plea of want of jurisdiction before the learned Assistant Sessions Judge nor before the Court of Sessions and, therefore, the said plea of the accused may not be entertained for the first time in revision before this Court. In support of this submission, Mr. Sardessai has placed reliance on an unreported Judgment of this Court dated 5-2-2004 in Criminal Revision Application No.58/2003 in the case of **Vasudeo Raut** v. **State** wherein this Court observed thus:-

> "In the present case, the appeal has been made over to the Assistant Sessions Judge by an Order of the Sessions Judge which is reflected in the roznama. Obviously, this ground regarding jurisdiction was not raised before the learned Assistant Sessions Judge and it is being raised for the first time in this Criminal Revision Application. The petitioner had

> submitted to the jurisdiction of the learned Assistant Sessions Judge hearing the appeal. It is also not claimed before me that any prejudice has been caused to the applicant/accused by the learned Assistant Sessions Judge hearing the appeal. In any event, the Assistant Sessions Judge vide Section 381 of the Code was competent to hear the appeal assigned to it".

8. I have perused the two authorities cited on behalf of the accused. The first Judgment deals with waiver or acquiescence with reference to territorial or pecuniary jurisdiction of the Civil Courts and the second regarding the manner of recording a confessional statement under Section 164 (4) of the Code. In my view, the said Judgments are of no assistance to the case of the accused. I am inclined to follow the Judgment of this Court dated 5-2-2004 and since the accused had not raised the plea before the learned Assistant Sessions Judge that he had no jurisdiction to try the accused nor before the Court of Sessions, I am not inclined to allow raising of such plea for the first time in this revision and this is so on the principle that a party cannot submit to jurisdiction and take a

chance judgment and then assail it in appeal on the ground that the Court had no jurisdiction to try him.

9. That apart, the contention that the accused could not be tried by the learned Assistant Sessions Judge for an offence under Section 307 I.P.C. because it is made punishable with life imprisonment because there are limitations on the powers of the learned Assistant Sessions Judge not to punish a person for imprisonment of more than 10 years appears to be ill founded. In my view, the power to try an offender is quite distinct and different from the power to impose punishment as provided by the Code. In this regard, a brief reference to certain provisions of the Code will not be out of context.

10. Section 6 of the Code deals with Classes of Criminal Courts and that includes besides the High Court, the Court of Session, the Judicial Magistrate of the first class and, in case of metropolitan area, the Metropolitan Magistrate and the Judicial Magistrate of the second class and the Executive Magistrate. A Court of Session is established by the State Government in terms of Section 9 of the Code and Sub-Section(2) thereof provides

that every Court of Session shall be presided over by a Judge, to be appointed by the High Court. Sub-Section(3) thereof which is of more importance reads as follows:-

> 3. The High Court may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in a Court of Session.

11. Section 10 of the Code provides for subordination of Assistant Sessions Judges and Sub-Section(1) thereof provides that all Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction. Sub-Section(2) of Section 10 which could be said to be next in importance, provides that the Sessions Judges may, from time to time, make rules consistent with this Code, as to the distribution of business among such Assistant Sessions Judges. We would not be concerned with Sub-Section(3) of Section 10 of the Code which enables the Sessions Judges to make provision for disposal of urgent applications, etc.

12. Section 28 of the Code deals with sentences which

High Courts and Sessions Judges may pass and Sub-Section(2) thereof provides that a Sessions Judge or Additional Sessions Judge may pass any sentence authorised by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court. Sub-Section(3) of Section 28 which is next in importance reads as follows:-

> "An Assistant Session Judge may pass any sentence authorised by law except a sentence of death or of imprisonment for life or of imprisonment for a term exceeding 10 years. Section 194 of the Code provides that an Additional Sessions Judge or Assistant Sessions Judge shall try such cases as the Sessions Judge of the division may, by general or special order, make over to him for trial or as the High Court may, by special order direct him to try.

13. Section 26 of the Code provides as to by which Courts the offences are triable. Sub-Section(a) which we are concerned provides that any offence under the Indian Penal Code(45 of 1860) may be tried by -

(i) the High Court, or
(ii) the Court of Session, or
(iii) any other Court by which such offence is shown in the First Schedule to be triable.

14. The First Schedule to the Code, in terms of column 6, shows by which Courts the offences under the Indian Penal Code are triable, namely, the Court of Session, Magistrate of the first class and any Magistrate in respect of offences mentioned in column 1. As far as Section 307 is concerned, the same has been made triable by the Court of Session. I have already stated that the power to try an offender for offences punishable under the Indian Penal Code is different from the power to inflict punishment and one need not be dependent on the other. This could be found with reference to Section 326 of the Indian Penal Code.

15. Section 326 I.P.C. has been made punishable with imprisonment for life or imprisonment for ten years and fine but as far as the trial of the same is concerned, it can be tried by the Magistrate of the first class, as can be seen from column 6 of the First Schedule to the Code. There is no doubt that Section 325

of the Code has made a provision regarding cases when the Magistrate is unable to pass a sufficiently severe sentence and Sub-Section(1) thereof provides that whenever a Magistrate is of the opinion, after hearing the evidence of the prosecution and the accused, that the accused is guilty and that he ought to receive a punishment different in kind from, or more severe than that which such Magistrate is empowered to inflict, or, being a Magistrate of the second class is of the opinion that the accused ought to be required to execute a bond under Section 106, he may record the opinion and submit his proceedings and forward the accused to the Chief Judicial Magistrate to whom he is subordinate and the Chief Judicial Magistrate in terms of Sub-Section(3) is required to examine the parties etc. and to pass a Judgment, sentence or order as he thinks fit and in accordance with law. One may tend to argue that there is no such provision as far as the trial of offences by Assistant Session Judges are concerned which enables them to forward the case to the Sessions Judge, whenever they are unable to pass a sentence of more than ten years. However, I must hasten to add that we are not concerned with such a situation in this case. Even otherwise, it can be noticed that although Section 326 I.P.C. is made punishable with life imprisonment and even if a case is transferred to the Chief Judicial Magistrate, in terms of Section 325 the

Chief Judicial Magistrate will have his own limitations in that he will not be able to impose life imprisonment, his power of sentencing being of not more than seven years. In fact, Mr. Bras De Sa was unable to provide any explanation as to what type of work Assistant Session Judges were required to do when they are appointed to exercise the jurisdiction in the Court of Sessions. In my view, an Assistant Sessions Judge in terms of Sub-Section (3) of Section 9 exercises jurisdiction in a Court of Session and while exercising such jurisdiction an Assistant Sessions Judge could have certainly tried a case under Section 307 I.P.C. which is sessions triable in terms of Section 26 of the Code r/w Schedule I and, therefore, there is no question that he had no jurisdiction to try the case under Section 307 I.P.C. In my view, the trial of cases is governed by Section 26 of the Code r/w Schedule I and imposition of the sentences by Section 28 of the Code and Section 26 of the Code is not dependent on Section 28 of the Code. In other words, the power or jurisdiction to try an offence is not dependent on the power to impose sentences. The contention that the trial of the accused was without jurisdiction, therefore, deserves to be rejected. As far as the aspect of prejudice being caused to the accused, it may be stated that Section 374 deals with Appeals from convictions. Sub-Section(2) of Section 374 provides that when any person is convicted on a trial held by a Sessions Judge or an Additional Sessions Judge or on a trial held by any other Court

in which a sentence of imprisonment for more than 7 years has been passed against him or against any other person convicted at the same trial, may appeal to the High Court. Sub-Section(3) of Section 374 of the Code further provides that save as otherwise provided in sub-section(2), any person, -

> (a) convicted on a trial held by a Metropolitan Magistrate or Assistant Sessions Judge or Magistrate of the first class, or
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> (b) sentenced under Section 325, or
>
> (c) in respect of whom an order has been made or a sentence has been passed under Section 360 by any Magistrate, may appeal to the Court of Session.

16. The accused in this case having been tried by the learned Assistant Sessions Judge has already availed of his right of appeal by filing the same to the Court of Session and now is here before this Court in this revision application. In case the accused was convicted by the Sessions Judge or the Additional Sessions Judge the accused would have had only a right of appeal namely to this Court but no revisional remedy; but, having been convicted and sentenced by Assistant Sessions Judge the accused had

not only the benefit of a right of appeal to the Court of Session but can now also prefer a revision application to this Court which the accused would otherwise not be entitled to. Hence, in my view, there is no prejudice which has been caused to the accused.

17. Mr. Bras De Sa has next submitted that the accused could not have been convicted under Section 307 I.P.C. but at the most under Section 326 I.P.C. This aspect appears to have been considered by the learned Sessions Judge in para 10 of the Judgment. The learned Sessions Judge has referred to the case of **Hari Kishan** v. **State of Haryana**(1988 SC 2127) wherein the Supreme Court had stated that the intention in a case of an offence of attempting to murder under Section 307 I.P.C. has to be gathered from all circumstances and not merely from the consequences that ensue and the illustrative instances set out by the Supreme Court which have to be taken into consideration are the nature of the weapon used, the manner in which it was used, the motive for the crime, the severity of the blow, the part of the body where the injury was inflicted, etc. In the case at hand, it can be seen from the prosecution evidence that the knife used by the accused was having a blade of 6 1/2 inches. The injury caused was a clean incised wound on the left lower part of the abdomen and was 4 x 3 cms. Its depth probably could not be gauged because the intestine was

protruding out of the said injury as per the evidence of PW3/Dr.Shaba Gaonkar. As per the evidence of PW4/Dr. E. J. Rodrigues, the said injury was fatal in the ordinary course of nature. The other evidence on record shows that there was enemity between both the brothers namely the accused and PW5/Chandrakant Gaonkar and the injury was inflicted by the accused without any immediate provocation and at a time when PW5/Chandrakant Gaonkar was inside his house along with his wife, having tea when the accused suddenly entered the house, caught the shirt collar of PW5/Chandrakant Gaonkar with his left hand and with the right hand stabbed PW5/Chandrakant Gaonkar with the said knife and saying "Ata Mor Re"(now you die) and thereafter ran away along with the said knife. In my view, the words of the accused speak more eloquently than the injury caused by him to PW5/Chandrakant Gaonkar and being so the conclusion was inescapable that the accused had inflicted the said injury intending to cause the death of PW5/Chandrakant Gaonkar. Mr. Bras De Sa submits that PW1/Suvarna has not corroborated PW5/Chansdrakant as regards the said words uttered by accused. She might have not. However, it is not the case of the accused that PW5/Chandrakant had added those words in the course of trial. Both the Courts have accepted the version of PW5/Chandrakant and I have no reasons not to accept the same. In my

view, there is no scope for reduction of conviction from Section 307 to 326 I.P.C.

18. In the light of the above discussion, I find there is no merit in this revision and consequently the same is hereby dismissed. The Bail Bonds of the accused shall stand cancelled.

N. A. BRITTO, J.

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